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No. 00-1312

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner

v.

JOAQUIN ALVARADO AND JORGE LOPEZ,

Respondents

On Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENT ALVARADO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the state's highest court properly hold invalid a trial court's pretrial order which would have permitted the state to prosecute Respondents for capital murder based on the anonymous testimony of key witnesses whose identities would be completely withheld from Respondents and their counsel throughout the trial, because the trial court found that disclosure of the witnesses' identities was likely to pose a significant danger to their safety, but the state's highest court found that such non-disclosure would significantly impair the Respondents' ability to investigate the case and efffectively cross-examine the witnesses, and further found that the state retained numerous other means of affording adequate protection to the witnesses?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

Respondents are charged with capital murder. The alleged crime occurred in the Los Angeles County Jail where the Respondents and the decedent were inmates. The key prosecution witnesses were other inmates who were convicted felons; one was a convicted murderer.

Prior to trial, the state resisted disclosing to the Respondents the identities of the key prosecution witnesses against

them. Following a hearing from which the Respondents and their counsel were excluded, the trial court found that disclosure of the witnesses' identities was likely to pose a serious danger to their safety, and ordered that the prosecution could permanently withhold revealing the identities of the key witnesses, thereby allowing them to testify anonymously at trial.

The California Supreme Court, on pretrial review of the order, unanimously held it to be invalid because it violated the Confrontation and Due Process Clauses of the United States Constitution. (U.S. Const., 6th and 14th Amend.) Alvarado v. Superior Court, 23 Cal.4th 1121 (2000).

In doing so, it followed long established precedent of this court and every federal appeals and state appellate court which has considered the issue.

In its carefully fashioned opinion, the state's highest court acknowledged that the witnesses in question were "crucial witnesses whose veracity and credibility are likely to be central to the prosecution's case." Id. at 1146-7. The Court found that permanent non-disclosure would "significantly impair the defense's ability to investigate or effectively cross-examine them." Id. at 1147. The Court further found that Respondents had not waived their constitutional rights to confrontation and due process, because the state had not raised this issue in the trial court, thereby depriving Respondents of the opportunity to contest the evidence or litigate the issue, and found that the trial court

record did not support the waiver theory. Id. at 1149, fn. 13. Finally, the Court found that the state retained numerous other means of affording adequate protection to the witnesses, all of which had been established by the California Legislature. Id. at 1149, fn. 51.

ARGUMENT

I.

PETITIONER HAS SHOWN NO REASON WHY A WRIT OF CERTIORARI SHOULD BE GRANTED UNDER RULE 10

Rule 10 of the Rules of the Supreme Court of the United States provides that review on a writ of certiorari is "not a matter of right, but of judicial discretion" and will be granted only for "compelling reasons."

Petitioner has failed to show any "compelling reasons" for the granting of his Petition for Writ of Certiorari. Petitioner mischaracterizes the holding of the California Supreme Court, ignores its factual findings and misstates applicable law. Petitioner attempts to disguise the case as one of first impression. It is not. In fact, for over 70 years, this Court, as well as every federal and state court to consider the issue, has held that American criminal trials based on the testimony of key witnesses, who remain anonymous and wraith-like, violate the Confrontation and Due Process Clauses. Petitioner also labels the case compelling. It is not. The California Supreme Court specifically found that the state retains numerous other means of

affording adequate protection to the witnesses under state law.

II.

THE PETITIONER MISREPRESENTS THE FACTS AND APPLICABLE LAW AND CASTS THE CALIFORNIA SUPREME COURT'S DECISION IN A FALSE LIGHT

The California Supreme Court found that the trial court's order would permit the identities of the witnesses to be permanently withheld from the Respondents, thereby allowing the witnesses to testify anonymously at trial, even though they were crucial prosecution witnesses and withholding their identities would "significantly impair the defense's ability to investigate or effectively cross-examine them." Alvarado v. Superior Court, 23 Cal.4th 1121, 1147 (2000).

Contrary to the first question presented in the Petition for Writ of Certiorari, the California Supreme Court held that the Confrontation Clause did not give a criminal defendant an absolute right under the Confrontation and Due Process Clauses to the true identity of the witnesses against him. Id. at 1146. The Court held that the trial court retained authority to control the timing of disclosure of the identities of witnesses and, upon a proper showing, delay such disclosure until trial or shortly before trial. Id. at 1146. The Court further held that upon a proper showing, a trial court could withhold the identity of a witness who was not a key witness or crucial to the prosecution's case. Id. at 1142-6.

However, the Court also found that, on the record of the case before it, the witnesses against Respondents were crucial to the prosecution's case and that permanent non-disclosure of their

identities would "significantly impair the defense's ability to investigate or effectively cross-examine them," thereby denying Respondents a fair trial. Id. at 1146, 1148.

The California Supreme Court rejected Petitioner's argument, which is repeated in this Court, that this is a case of first impression. The states's highest court held that its decision was in accord with this Court's decisions in Alford v. United States, 282 U.S. 687 (1931); Roviaro v. United States, 353 U.S. 53 (1957) and Smith v. Illinois, 390 U.S. 129 (1968). Alvarado v. Superior Court, supra, at 1137-40. The California Supreme Court also observed that despite Petitioner's claim, repeated in this Court, that numerous federal cases supported the trial court's order, in fact none did, nor did any state court decision. The state's highest court found that none of the cases relied on by Petitioner allowed permanent non-disclosure of a key witness's very identity. Rather, those cases involved non-disclosure of the witness's address, or the witness was inconsequential, or the witness's identity was made available to defense counsel or the witness's identity was discovered during trial. The state's highest court further observed that in every reported case where a witness's identity was deemed crucial, disclosure at trial was held to be constitutionally compelled. Id. at 1141-6.

Confronted with this 70 year unbroken line of cases which consistently have rejected Petitioner's arguments, Petitioner turns to a single case, United States v. Borda, No. 96-4752, 1999 U.S. App. Lexis 9031 (4th Cir. May 11, 1999), an unpublished decision by

the Fourth Circuit. Petitioner's reliance on Borda is misplaced, because he misstates what the case stands for. In Borda it was the appellant, not the Court, who described the witness as "key." Also, unlike the present case, where the California Supreme Court found that the testimony of the witnesses whom the prosecution sought to present anonymously was the only evidence of guilt, a second witness in Borda was described by the Fourth Circuit as the "star witness," and there was a video tape of a meeting which was a major component of the undisclosed witness's testimony.

In the second question presented in the Petition for Writ of Certiorari, Petitioner ignores the findings of the California Supreme Court that the trial court retains numerous other means of adequately protecting the witnesses, which made its order not only constitutionally invalid, but unnecessary. These alternatives, all authorized by the California Legislature, include protective surveillance and housing, relocation, documents to establish a new identity, transfer of an incarcerated witness to another prison, either within or outside California, closure of the courtroom, and the enforcement of "numerous stringent criminal sanctions that are available against witness harassment and intimidation." Alvarado v. Superior Court, supra at 1150-1.

In the third question presented in the Petition for Writ of Certiorari, Petitioner ignores the factual findings of the California Supreme Court on the issue of waiver. The Court found that not only had the state not raised this issue in the trial court, but its failure to do so had deprived Respondent Alvarado of

the opportunity to protest the evidence or litigate the issue. Also, Petitioner ignores that the state's highest court found that the trial court record did not support the waiver theory. Id. at 1149, fn. 13.

Despite Petitioner's attempts to disguise the record, its attempt to turn settled law into a case of first impression, and its calling the case compelling although the California Supreme Court factually found to the contrary, this case presents no "compelling reasons" under Rule 10 for a grant of certiorari. The California Supreme Court decision is largely based on its factual findings and its careful application of settled law to an overbroad, unnecessary and constitutionally defective pretrial order of a lower court which would have denied Respondents a fair trial. Accordingly, the Petition of Writ of Certiorari should be denied.

Dated: March 14, 2001

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